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# In the Supreme Court of the United States

OCTOBER TERM, 1974

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**No. 74-940**

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL.,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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**No. 74-949**

MARY AKIN, ET AL.,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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## BRIEF OF AMICI CURIAE, NATIONAL CONGRESS OF AMERICAN INDIANS, INC., CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, CROW TRIBE OF MONTANA, HOOPA VALLEY TRIBE OF CALIFORNIA, QUINAULT TRIBE OF WASHINGTON, SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER RESERVATION, WYOMING, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, NORTH DAKOTA

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THREE AFFILIATED TRIBES OF THE FORT
BERTHOLD RESERVATION, NORTH DAKOTA**

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## I. STATEMENT OF INTEREST

This brief is filed with the written consent of all parties.

Amicus curiae the National Congress of American Indians, Inc. (NCAI), a nonprofit association of most of the Indian tribes in this country, was formed to promote the interests of American Indians. NCAI was incorporated in Oklahoma in 1954, and now has national headquarters at 1430 K Street, N.W., Washington, D.C.

The other amici named are organized, self-governing Indian tribes, recognized as such by the Secretary of the Interior. Each has water rights which will be affected by the decision of this Court in the instant cases.

Your amici support the position of the United States, particularly as it represents as trustee the Ute Mountain Ute and Southern Ute Indian Tribes, and urge that the Court affirm the decision below, thereby permitting the United States District Court to adjudicate the Indian water rights involved in these cases.

## II. INDIAN WATER RIGHTS ARE PRIVATE PROPERTY RIGHTS, HELD BY THE UNITED STATES IN TRUST FOR THE INDIANS, AND CONGRESS HAS MADE NO PROVISION IN THE McCARRAN AMENDMENT, 43 U.S.C. § 666, FOR ADJUDICATION OF THOSE RIGHTS IN STATE COURTS.

Petitioners would read the McCarran Amendment, 43 U.S.C. § 666, as conferring upon the state courts exclusive jurisdiction to adjudicate not only all federal proprietary water rights, but all Indian water rights held in trust by the United States.

The statute simply does not express that intention. In fact, it does not even mention Indian water rights. The McCarran Amendment merely waives the sovereign immunity of the federal government from suit in state court adjudications of water rights *owned* by the United States. Without greater specificity, the waiver refers only to proprietary rights of the United States held for its own use, such as on military installations, national parks, and public lands,[1] and not to the unique legal arrangement whereby the federal government holds only legal title to private property, including water rights, in trust for the beneficial use of Indians and Indian tribes.[2]



This Court has never blurred the distinction between Indian property and federal property. The Court has recognized that when Indian reservations were established, the United States did not grant to the Indian tribes their property rights in the reservations, but rather the tribes simply retained all those rights they had held, often from time immemorial. *United States* v. *Winans*, 198 U.S. 371, 381 (1905). The Court long ago confirmed that among the property rights retained were water rights, without which, all else the Indians hold would be valueless. *Winters* v. *United States*, 207 U.S. 564, 576 (1908).

Protection and adjudication of Indian property are placed by the United States Constitution exclusively within federal jurisdiction, *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 670 (1974), and do not become

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[1] Congress is empowered to make all necessary regulations for the property of the United States. United States Constitution, Art. IV, sec. 3, cl. [2]. But that power does not relate at all to its responsibility, as trustee, to protect property which the United States holds in trust for an Indian tribe.

[2] Nothing in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520 (1971), holds to the contrary. That case stands only for the proposition that federal reserved rights are subject to the provisions of the McCarran Amendment. Any reference to Indian water rights therein is not controlling here, because that case was concerned only with the federal reserved proprietary water rights to a national forest and other federal areas. The distinction between Indian water rights and federal rights was not addressed.

subject to state authority "except by virtue of express authority conferred upon the State by act of Congress." *McClanahan* v. *Arizona State Tax Comm'n.*, 411 U.S. 164, 171 (1973).[3]

The constitutional underpinning for such federal authority is today more than justified by the "great hesitancy" and "traditional fear" Indians have in subjecting themselves to state tribunals. S. REP. NO. 1507, 89th Cong., 2d Sess. 2 (1966). A former Solicitor of the Department of the Interior has stated:

> "If history teaches us anything, it teaches us that Indian claims, particularly those encompassed within the category of 'reserved water rights,' are not going to receive a cordial reception from state engineers and state courts. Nothing but mischief can come from suggestions that Indian rights should be quantified and recorded in conformity with state proceedings for the adjudication of water rights. . . ."[4]

The special nature of Indian property and the federal basis of its protection make it clear that if the McCarran Amendment had been intended to eliminate federal court jurisdiction to adjudicate Indian water rights, Congress

[3] As stated, the McCarran Amendment does not expressly embrace the private water rights of Indians. The legislative history of the statute, some of which is cited in Petitioners' Brief, p. 25, n. 13, is at best ambiguous on the question. Even the author of the legislation was uncertain whether the measure would cover Indian rights. 97 Cong. Rec. 12948 (1951) (exchange between Senators McCarran and Chavez).

[4] Letter from Hon. Edward Weinberg, December 15, 1971, quoted in 74 COLUM. L. REV. 1299, 1309 n.66 (1974). Mr. Weinberg further commented that it was unrealistic ". . . [t]o assume that the Court will exercise its certiorari power to the extent necessary to provide an effective ongoing appellate remedy." *Id.* at 1310 n.67. *See also, Water Policies of the Future*, Final Report to the President and the Congress of the United States by the National Water Commission, at 478-79 (1973).



would have expressly so provided. *McClanahan* v. *Arizona State Tax Comm'n., supra.* Congress did not do so, either there or in any other legislation. In fact, one year after passing the McCarran Amendment, Congress reaffirmed that the determination of Indian water rights was within exclusive federal jurisdiction when it enacted Public Law 280, the Act of August 15, 1953, 67 Stat. 588. That statute authorized partial assumption of state jurisdiction over Indian reservations in civil causes of action and criminal cases, but section 4, 67 Stat. 589, 28 U.S.C. 1360(b), specifically withheld from the states any authority over

> "alienation, encumbrance, or taxation of any real or personal property, *including water rights*, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States . . ." (emphasis added)

and withheld jurisdiction from state courts "to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein." *Id.*

Read *in pari materia*[5] with section 4 of Public Law 280, the McCarran Amendment plainly does not oust Indian water rights from the exclusive jurisdiction of the federal courts.

[5] *See, Menominee Tribe* v. *United States*, 391 U.S. 404, 410-11 (1968), where the Court read the Menominee Termination Act, 25 U.S.C. §§ 891-902, *in pari materia* with Public Law 280 and thereby concluded that that Tribe's hunting and fishing rights were not taken by the former Act.

## III. CONCLUSION

The decision of the United States Court of Appeals for the Tenth Circuit in the instant cases should be affirmed.

Respectfully submitted,

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